

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID FORREST WAITMAN,

Plaintiff,

Case No: 1:14-cv-162

v.

HON. JANET T. NEFF

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

Plaintiff seeks judicial review of a decision of the Commissioner of the Social Security Administration, denying Plaintiff's claim for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. *See* 42 U.S.C. § 405(g). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R & R) (Dkt 16), recommending that this Court affirm the Commissioner's decision. The matter is presently before the Court on Plaintiff's Objection to the Report and Recommendation (Dkt 17). Defendant has filed a detailed Response to Plaintiff's arguments (Dkt 18). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. Civ. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff, who is an admitted alcoholic (Dkt 17 at p. ID# 861), raises two objections to the Report and Recommendation based on the Magistrate Judge's analysis of his substance abuse and

her determination that the Administrative Law Judge (ALJ) was not required to issue a subpoena. Both objections are without merit for the reasons well-stated in Defendant's Response (Dkt 18).

In short, the Magistrate Judge properly deferred to the ALJ's determination that Plaintiff would not be disabled in the absence of his substance abuse. The Magistrate Judge correctly determined that the ALJ was justified in not crediting treating psychologist Maureen Fabiano's assessment of Plaintiff's functioning in the absence of substance abuse. The Magistrate Judge's determination was based on an accurate review of the record, which revealed that "during the majority of the time period presently at issue, Plaintiff was unable to both maintain sobriety and take his prescribed medication" (Response at p. ID# 868, quoting R&R at p. ID# 856). Further, when Plaintiff remained sober and took his medication, his ability to function was greatly improved and was consistent with the RFC determination (*id.*; R&R at p. ID# 857). The ALJ's analysis of this issue also has additional support in the record (*see* Response at p. ID# 868-69). This objection is denied.

Second, the Magistrate Judge properly determined that the ALJ's failure to issue a subpoena to Dr. Shy does not warrant remand, because (1) Plaintiff waived the issue by failing to raise it before the ALJ; and even if not waived, (2) any error was harmless, as Plaintiff's interrogatories to Dr. Shy did not address the question of his abilities in the absence of substance abuse, but rather, merely addressed his functioning in general (Response at p. ID# 869-70; R&R at p. ID# 857-59). Plaintiff presents no specific argument or evidence to undermine the Magistrate Judge's finding of harmless error. Plaintiff's objection regarding the subpoena is denied.

Having found Plaintiff's objections without merit, the Court will adopt the Report and Recommendation, and affirm the decision of the Commissioner. Judgment will be entered consistent with this Opinion.

Accordingly:

IT IS HEREBY ORDERED that the Objection (Dkt 17) is DENIED, the Report and Recommendation of the Magistrate Judge (Dkt 16) is APPROVED and ADOPTED as the Opinion of the Court, and the decision of the Commissioner of Social Security is AFFIRMED.

Dated: March 31, 2015

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge